IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.538 OF 2004

IN

B.C.C.C. SUIT NO.5487 OF 1999

Shivji Bhanji Shah. .. .. Appellant
(Orig. Plaintiff)

V/s.

The Municipal Corporation of Greater Bombay. .. .. .. Respondents
(Orig.Respdts.)

Mr.M.R. Yadav for Appellant.

Mr.J.J. Xavier for Respondents.

CORAM : ROSHAN DALVI, J.

Dated : 6th June, 2007

ORAL JUDGMENT :

1. The Appellant has challenged the judgment and order dated 16.12.2003 of the Judge of the Bombay City Civil and Sessions Court, Bombay, dismissing the Appellant's (original

Plaintiff's) Suit, which was for an injunction restraining the Respondents from demolishing the structure impugned in the notice issued to the Appellant under Section 351 of the Bombay Municipal Corporation Act (BMC Act).

2. The notice was in respect of construction of a structure of B.M. Walls and ladi coba slab with partly mazanine floor. It was at the rear of the Appellant's structure in which he carried on business in the names of Central Stores and Central Oil. The Appellant's Advocate states that this business is carried by the sons of the Appellant. The impugned construction extends from the structure of the Appellant until the compound wall of the building viz. Malad Deep.

3. In reply to the notice, the Appellant relied upon the rent receipt of 1998, the city survey plan dated October 1998, licence issued to the Appellant in April 1987 and the registration certificate of his shops and establishment issued

in January 1990. The DMC considered his reply and passed an order that his documents do not show authorization or even toleration of the suit structure. The notice and the order were challenged in the Suit. The Appellant led evidence. From the evidence it is seen that the Appellant failed to prove the authorization of his structure.

4. The Appellant essentially relies upon the city survey plan and the plan issued by the Superintendent of Land Records (which is not a part of the record) which show all the construction on the entire survey number. The Appellant's Advocate is unable to identify the precise suit structure on the plan. The plan is, therefore, of little assistance. The other documents show his possession of the entire shop (not only the unauthorized portion) from and after 1987
which also do not carry the case of the Appellant
any further.

5. The Appellant failed to prove that the structure under

reference in the notice was authorized. The Appellant's evidence has been fully considered by the learned trial Judge. He has correctly come to the conclusion that the Appellant failed to prove authorization of his structure and is not entitled for any relief. The Suit, accordingly, stood dismissed.

6. The Appellant has relied upon a further notice issued to his neighbour also under Section 351 of the BMC Act. That notice is in respect of several unauthorized constructions shown therein. The Appellant also was issued this notice as the owner of the Central Stores. The notice shows his premises of Central Stores excluding the unauthorized construction which is by way of extension extending upto the compound wall. Hence, it is seen that the impugned construction in the notice issued to the Appellant which was a part of the impugned judgment in the above Suit was not a part of the later notice. The earlier structure of the Appellant which is shown to be Central Stores is the only

portion shown in that notice. The neighbour's portion is however of a larger land. That portion extends until the compound wall of the building Malad Deep.

7. The Appellant's Advocate relies upon the letter/order of the Assistant Engineer (B. & F.) P/North Ward of the BMC, dropping action on scrutiny of the documents in the later notice. Consequently, it is seen that the action in respect of the main structure of the Appellant has been dropped. There is no action in respect of that structure under the impugned notice in the above Suit. The only offending portion is the further construction of the extension behind that structure and extending upto the wall. That portion has not been regularized. Action in respect of that portion has not been dropped in the later notice. In fact, that portion does not form a part of the later notice at all.

8. Reliance upon the later notice and dropping of the action is not only outside the record but is misplaced and

mischievous. That does not form part of the record. A minute consideration shows that the later notice is not in respect of the same construction. Only the offending portion of the Appellant's structure which is not proved by the Appellant to be either authorized or tolerable and which forms a part of the notice in the above Suit is required to be considered. The Appellant has not proved the authorization of that structure. The learned Judge has correctly considered his case. The Suit is correctly dismissed. The Appeal stands dismissed. Interim order, if any, stands vacated.

9. No order as to costs.

(ROSHAN DALVI, J.)